INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes, regulations, and Navy civilian personnel instruction involved	2
Statement	2
Argument	6
Conclusion	9
Appendix	10

CITATIONS

Statutes, and Regulations:	
Supplemental Appropriation Act of 1951 (First Whitten Amendment), 64 Stat. 1066, Section 1302(a)	3, 10
Supplemental Appropriation Act of 1952 (Second Whitten Amendment), 65 Stat. 757, Section 1310(a)	6, 10
Civil Service regulations:	
5 C.F.R. (1949 ed.) 2.114(c)	8
5 C.F.R. (1949 ed.) 6.1(e)	8
5 C.F.R. (1949 ed.) 6.101(d)	8
5 C.F.R. (1950 Supp.) 2.115(a)	7, 11
5 C.F.R. (1950 Supp.) 4.301(a)(5)	7, 11
5 C.F.R. (1952 Supp.) 20.4(c)	12
5 C.F.R. (1952 Supp.) 20.4(c)(1)	12
5 C.F.R. (1952 Supp.) 20.4(c)(2)	12
5 C.F.R. (1952 Supp.) 20.4(c)(3)	3
Miscellaneous:	
Navy Civilian Personnel Instruction 170:	
33b	13
33b(1)	13
33b(2)	13
33b(3)	13

642706 62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 943

CHARLOTTE SLAVITT, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–8a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1961. A timely petition for rehearing was denied on February 7, 1962. The petition for a writ of certiorari was filed on May 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner, a non-veteran, held an indefinite appointment in the competitive service and was, therefore, for purposes of a reduction in force,

properly placed in group III–B on the retention register.

2. Whether petitioner was entitled to reemployment rights in the Department of Labor after her separation from the Department of the Navy.

STATUTES, REGULATIONS, AND NAVY CIVILIAN PERSONNEL INSTRUCTION INVOLVED

The pertinent provisions of the Supplemental Appropriation Act of 1951 (64 Stat. 1066) and 1952 (65 Stat. 757), the Civil Service Regulations, and Navy Civilian Personnel Instruction 170 are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

On April 25, 1949, petitioner received an excepted appointment as Attorney Advisor P–4, in the Department of Labor, until June 30, 1949. On July 1, 1949, petitioner's appointment was extended to September 30, 1949 (Def. Ex. 2). On September 4, 1949, petitioner received another excepted appointment as Attorney Advisor in the Labor Department "not to exceed duration of the war and six months thereafter" (Def. Ex. 3).

While at the Department of Labor, petitioner passed a competitive Civil Service examination as Contract Specialist, Grade GS–12. When certified as a Contract Specialist Eligible, petitioner resigned her position at the Department of Labor on April 6, 1951, and accepted an indefinite appointment as a Contract Specialist GS–12 at the United States Navy Purchasing Office (Def. Ex. 5, 6, 21). At the time of peti-

tioner's appointment, the First "Whitten Rider," 64 Stat. 1066, was in effect, which provided that all appointments after September 1, 1950, and during the fiscal year 1951, should be indefinite appointments. Persons given such appointment did not acquire permanent civil service status.

Thereafter, in June 1953, as a result of the anticipated decrease in work load for the fiscal year 1954 for the Navy Purchasing Office, the Chief of the Bureau of Supplies and Accounts ordered a reduction in force. Because she held an indefinite appointment, petitioner was placed in group III–B in her competitive level for the purpose of compiling the retention register.[1] Since the only other two positions in petitioner's competitive level were held by employees in Subgroup A, petitioner was reached for reduction in force and was given notice of her separation from service on June 23, 1953, to be effective July 31, 1953 (Def. Ex. 7).

On July 11, 1953, petitioner appealed her separation to the Reduction in Force Appeals Unit of the Civil Service Commission (Def. Ex. 16). After consideration of this appeal, this unit advised petitioner

---

[1] The Civil Service retention preference regulations define group III as follows (5 C.F.R. (1952 Supp.) 20.4(c)(3)):

"Group III—Indefinite. This group includes persons serving under non-status non-temporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditioned promotion or reinstatement or a specific time limitation of one year or less. Within this group, persons entitled to veteran preference are in sub-group 'A' and others in sub-group 'B'."

on August 21, 1953, that a review of her case had failed to disclose any irregularities under the terms of the retention preference regulations and that her appeal could not be sustained (Def. Ex. 17). On August 28, 1953, petitioner appealed to the Board of Appeals and Review of the Civil Service Commission (Def. Ex. 18) and submitted additional argument and data in support of her appeal (Def. Ex. 13–15). On August 26, 1954, the Board of Appeals and Review advised petitioner, *inter alia*, that she was placed in retention group III–B since she was an indefinite employee and did not have veterans' preference, that an indefinite employee in group III–B did not have any mandatory rights of reassignment to other continuing positions in the agency, that there was no proper basis upon which to sustain her appeal, and that the action of the Department of the Navy was affirmed (Def. Ex. 23).

In letters dated September 10, 1954, and October 23, 1954, petitioner requested reconsideration of the Board of Appeals and Review's decision (Def. Ex. 24, 26). On November 3, 1954, petitioner was informed by the Board that, since she had not presented any new facts for consideration by the Commission which could serve as a basis for reversing the action previously taken, her request for reopening her appeal was denied (Def. Ex. 27).

Thereafter, petitioner brought this suit in the Court of Claims to recover back pay from the date of her separation, alleging that she was placed in the wrong group on the retention register and was thereby illegally separated by reduction in force. Petitioner also

claimed that the action of the Department of the Navy in separating her and the decision of the Civil Service Commission sustaining this action were arbitrary.

The Court of Claims found (Pet. App. 1a-8a) that petitioner resigned her position with the Department of Labor. Consequently, it held that petitioner was properly placed in group III-B and reached for separation, since under the "Whitten Amendment" and the Civil Service regulations she could only have received an indefinite appointment at the time she received her appointment in the Navy Department. The court rejected petitioner's contention that she was an inter-agency transferee, retaining her status as a permanent employee under the "Second Whitten Amendment." The court further held that, assuming, *arguendo*, that petitioner had not resigned and accepted a new appointment with the Navy Department, she could not have transferred to the Navy Department since she did not have competitive status at the time of her employment with the Department of Labor. Moreover, the record was clear that petitioner's three appointments at the Department of Labor all had a time limitation, and therefore she could not have been a permanent employee at that Department or through transfer at the Navy Department. Finally, the court held that there was nothing in the record, other than petitioner's own affidavit that certain Navy officials were "out to get her," to sustain the contention that the actions of the Navy Department and the Civil Service Commission were arbitrary. This, the court ruled, was insufficient to overcome the strong presumption that public officials had acted in good faith.

ARGUMENT

The Court of Claims was clearly correct in deciding, on the basis of documentary evidence, that petitioner had resigned her position at the Department of Labor to accept employment with the Navy Department and that, as an indefinite employee in group III–B in her competitive level at the Navy Purchasing Office, she was properly reached for separation as a result of a reduction in force. Its decision turns on facts particular to this case and presents no question of law warranting further review.

1. Petitioner contends that she was illegally separated by a reduction in force since she was improperly considered as an indefinite employee and placed in group III–B on the retention register. She reasons that she did not resign her position at the Department of Labor but merely transferred to the Navy Department and thereby retained her status as a permanent employee in the Department of Labor at her prior grade level. She bases this contention upon the "Second Whitten Amendment," 65 Stat. 737, which provides that permanent employees transferred "on a temporary or indefinite basis since September 1, 1950, shall be changed to a permanent basis * * *."

a. The first error in petitioner's contention is that she did not transfer from the Department of Labor to the Department of the Navy. Petitioner signed a Standard Form 52, "Request for Personnel Action," which listed "resignation" as the nature of action requested (Def. Ex.). The official records of the Department of Labor also contain a Standard Form

50 which shows the nature of action as "resignation" and further states "reason for separation: To accept position with Department of the Navy" (Def. Ex. 5). Furthermore, petitioner was appointed at Navy as the result of the Civil Service Commission's certificate No. H 8689, dated March 2, 1951, and Navy Standard Form 50, "Notification of Personnel Action," listed this certificate as the authority for her appointment (Def. Ex. 6). There is no question that petitioner resigned from the Department of Labor and accepted a new appointment.

Moreover, whether petitioner resigned or not, she could not have transferred from the Labor Department to the Navy Department at the time of her appointment. This is because an individual without competitive status may not transfer from the excepted service into the competitive service. See 5 C.F.R. (1950 Supp.) 4.301(a)(5). Petitioner was without competitive status and within the excepted service in the Department of Labor during her entire employment in that Department (see the Statement, *supra*, p. 2).

Therefore, it is clear that petitioner was given a new appointment in the Department of the Navy. Under the First Whitten Amendment and the Civil Service regulation (5 C.F.R. (1950 Supp.) 2.115(a)), petitioner could only have received an indefinite appointment at the time she was appointed in April 1951. Consequently, when petitioner was separated, she was a non-status employee with an indefinite appointment to a position in the competitive service and was properly placed in group III-B on the retention register. See *supra*, p. 3, note 1.

b. Apart from the fact that petitioner resigned and accepted a new appointment in the competitive service, it is clear that petitioner was never a permanent employee at the Labor Department. Petitioner's three appointments at the Department of Labor were designated as excepted appointments, all with limitations as to the duration of employment. The third and last of these appointments was designated "Excepted Appointment," effective September 4, 1949, with a notation "Duration of employment: Not to exceed duration of the war and six months thereafter." Therefore, petitioner was plainly not a permanent employee and, even assuming she transferred from the Labor to Navy Department, she was not covered by the Second Whitten Amendment.

Petitioner contends (Pet. 19–20) that her indefinite appointment in the Labor Department was illegal since the War Regulations had expired and 5 C.F.R. (1949 ed.) 2.114(c) authorizes time limitations on appointments only for "a period not to exceed 6 months." But, as the Court of Claims noted (Pet. App. 6a–7a), there is no indication on any of the employment records that petitioner was appointed under the War Regulations three years after they had expired. Furthermore, Section 2.114(c) applies only to the competitive service. Since petitioner, like most attorneys, was excepted from the competitive service under 5 C.F.R. (1949 ed. 6.101(d), 6.1(c)), she could be appointed for any desired period. In any event, even if petitioner had been illegally appointed in the Labor Department, this surely could not convert her limited, indefinite appointment into a permanent one.

2. Petitioner also contends (Pet. 2, 3-4, 22) that she was deprived of her reemployment rights in the Department of Labor after her separation by the Department of the Navy. But this contention depends on her claim that she was a permanent employee in the Labor Department. Since, as we have seen, petitioner was never a permanent employee at the Labor Department, her claim to reemployment rights is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
JOHN G. LAUGHLIN, JR.,
HARVEY M. GOLDBERG,
Attorneys.

JUNE 1962.

APPENDIX

Supplemental Appropriation Act of 1951, Section 1302 (First Whitten Amendment), 64 Stat. 1066, provides in pertinent part:

> After September 1, 1950, and during the fiscal year 1951:
>
> (a) In making appointments in the Government service the Civil Service Commission shall make full use of its authority to make temporary appointments in order to prevent increases in the number of permanent personnel and no employee in the Federal civil service promoted, transferred or appointed to a position of higher grade shall be eligible, in the event of separation from the service through reduction in force, to reinstatement at a grade above the grade held by such employee on September 1, 1950; * * *

Supplemental Appropriation Act of 1952, Section 1310 (Second Whitten Amendment), 65 Stat. 757 provides in pertinent part:

> Immediately upon the enactment of this Act and until termination of the national emergency proclaimed by the President on December 16, 1950:
>
> (a) The Civil Service Commission and the heads of the executive departments, agencies, and corporations shall make full use of their authority to require that initial appointments to positions in and outside the competitive civil service shall be made on a temporary or indefinite basis in order to prevent increases in the number of permanent personnel of the Federal Government above the total number of permanent employees existing on September 1,

1950: *Provided*, That any position vacated by a permanent employee called to military service or transferred to a national defense agency shall not be filled except on a temporary or indefinite basis. All reinstatements and promotions in the Federal civil service shall be made on a temporary or indefinite basis, and all permanent employees who are transferred from one agency to another shall retain their status as permanent employees in the agency to which transferred at the grade or basic pay level of their permanent positions in the agency from which transferred. * * *

5 C.F.R. (1950 Supp.) 2.115(a) provides in pertinent part:

> *Indefinite appointment*—(a) *In general.* On and after December 1, 1950, all new appointments shall be indefinite appointments except those of postmasters in all classes of post offices and, in unusual circumstances, appointments to positions for which the Commission determines that probational appointments are in the interest of the service: *Provided*, That agencies may give probational appointments after that date to eligibles who were regularly selected from certificates issued prior to December 1, 1950, for probational appointment. Such indefinite appointments shall be made from the Commission's registers of eligibles unless there are insufficient available eligibles. The Commission may restrict certification for indefinite appointment to eligibles that are immediately available because of residence or other conditions. The first year of service under an indefinite appointment shall be a trial period similar to the probationary period established by § 2.113. Persons given such appointments do not thereby acquire a permanent civil service status. * * *

5 C.F.R. (1950 Supp.) 4.201(a)(5) provides:

> "Competitive status" means a status which permits a person to be promoted, transferred,

reassigned, and reinstated to positions in the competitive service without competitive examination, subject to the conditions prescribed by the Civil Service rules and regulations for such noncompetitive actions. A competitive status is acquired by probational appointment through competitive examination, or may be granted by statute, Executive Order, or the Civil Service rules.

5 C.F.R. (1952 Supp.) 20.4(c) provides:

(c) *Determination of tenure groups.* For the purpose of determining relative retention preference in reductions in force, competing employees with performance ratings of "Satisfactory" or better shall be classified according to tenure of employment and veteran preference in groups and subgroups as follows:

(1) *Group I—Career.* In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, except that career employees serving under conditional promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis. In positions excepted from the competitive service, this group includes all employees serving under appointments with no conditions or restrictions. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

(2) *Group II—Career-Conditional.* In the competitive service, this group includes career employees who are conditional because they are serving probationary periods, or are "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, or are subject to some other limitation of a similar nature. In positions excepted from the competitive service, it includes employees who are conditional solely as the result of promotion or reinstatement. Within this group, persons entitled to veteran

preference are in subgroup "A" and others in subgroup "B".

(3) *Group III—Indefinite.* This group includes persons serving under non-status nontemporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of one year or less. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

NAVY CIVILIAN PERSONNEL INSTRUCTION 170, Reductions in Force, provides in pertinent part:

3-3.b. *Retention groups—competitive service.*

(1) *Group I—Career.*—This group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, except that career employees serving under conditional promotion (Group II) shall be considered in Group I with respect to positions at and below the grade in which they last served on a permanent basis.

(2) *Group II—Career—Conditional.*—This group includes career employees who are conditional because they are serving probationary periods, or are "indefinite" as the result of promotion, transfer, or reinstatement, or are subject to some other limitation of a similar nature. (Former employees who have re-entered competitive service positions are in this group if they are serving under indefinite appointments based on their competitive status. This includes only those indefinite appointments made under C.S. Reg. 7.105(a)(1), or former C.S. Reg. 7.105 (a)(4)).

(3) *Group III—Indefinite.* This group includes employees serving under non-status nontemporary appointments.